IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

UNITED STATES OF AMERICA — PLAINTIFF

vs. — Civil Action No. 4:95cv142-D-B

$19,510.00 IN UNITED STATES CURRENCY — DEFENDANTS

MEMORANDUM OPINION

This cause involves a forfeiture petition filed by the United States against a sum of monies allegedly used in the furtherance of an illicit drug transaction. More specifically, the amount of money in question was allegedly set aside as the purchase funds for a kilogram of cocaine. Presently before the court is the motion of the claimant Carl Kirkland to dismiss this forfeiture action, or in the alternative, grant summary judgment in his favor. Finding that the motion is not well taken, the court shall deny it.

. Discussion

. Nature of the claimant's motion

Mr. Kirkland has moved this court for alternative relief - dismissal or the entry of summary judgment. However, he has not provided this court with any admissible evidence to support his motion. Without evidentiary support to underlie his motion, this court cannot find that Mr. Kirkland has carried his burden to demonstrate that there are no genuine issues of material fact in the case at bar. In responding to Mr. Kirkland's motion, the United States has presented this court with documentary evidence as well as transcripts of prior testimony by Mr. Kirkland and an individual named Leroy Paul. Mr. Kirkland has not filed a rebuttal to the response of the United States. Therefore, if Mr. Kirkland is entitled to relief in this case, it is by virtue of his motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss this action.

A Rule 12(b)(6) motion is disfavored, and it is rarely granted. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986); Sosa v. Coleman, 646 F.2d 991, 993 (5th Cir. 1981). In deciding a motion to dismiss under Rule 12(b)(1) or (6), the district court accepts as true those well-pleaded factual allegations in the complaint. C.C. Port, Ltd. v. Davis-Penn Mortgage Co., 61 F.3d 288, 289 (5th Cir. 1995). "Taking the facts alleged in the complaint as true, if it appears certain that the plaintiff cannot prove any set of facts that would entitle it to the relief it seeks," dismissal is proper. Id. It must appear beyond doubt that the

plaintiff "can prove no set of facts in support of his claim which would entitle him to relief." Campbell v. City of San Antonio, 43 F.3d 973, 975 (5th Cir. 1995) (alterations and citations omitted). "However, 'the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" Id. (quoting 3 Wright & Miller, Federal Practice and Procedure: Civil 2d 1216, pp. 156-59). On the other hand, dismissal is never warranted because the court believes the plaintiff is unlikely to prevail on the merits. Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). Even if it appears an almost certainty that the facts alleged cannot be proved to support the claim, the complaint cannot be dismissed so long as the complaint states a claim. Clark v. Amoco Prod. Co., 794 F.2d 967, 970 (5th Cir. 1986); Boudeloche v. Grow Chemical Coatings Corp., 728 F.2d 759, 762 (5th Cir. 1984). "To qualify for dismissal under Rule 12(b)(6), a complaint must on its face show a bar to relief." Clark, 794 F.2d at 970; see also Mahone v. Addicks Utility District, 836 F.2d 921, 926 (5th Cir. 1988); United States v. Uvalde Consolidated Indep. Sch. Dist., 625 F.2d 547, 549 (5th Cir. 1980), cert. denied, 451 U.S. 1002. If a required element, a prerequisite to obtaining the requested relief, is lacking in the complaint, dismissal is proper. Id.; see also Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) ("Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."). While dismissal under Rule 12(b)(6) ordinarily is determined by whether the facts alleged, if true, give rise to a cause of action, a claim may also be dismissed if a successful affirmative defense appears clearly on the face of the pleadings. Clark, 794 F.2d at 970; Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir. 1982), cert. denied, 459 U.S. 1105.

. Venue

In his motion, Mr. Kirkland states:

> This court retains “original” subject matter jurisdiction based upon the filing of the complaint in this district by the plaintiff; yet the claimant questions the venue of this court based upon facts.

Motion of the Claimant, p.1. Nothing else in the motion explicitly addresses this venue question, but since many of the relevant facts surrounding the seizure of the subject property in this case occurred in California, the court presumes that the claimant would have the undersigned transfer this matter to a sister court in California. Venue would indeed be proper in a California court, but is also appropriate in this court.

In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the

> case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

28 U.S.C. § 881(j). The United States instituted criminal prosecutions in connection with the subject property within this district, including charges against the claimant in this case. United States of America v. J.D. Sanders, et al., Criminal Cause No. 2:93cr128-B (N.D. Miss. 1993). This argument of the claimant is without merit and this portion of the claimant's motion shall be denied.

. Standard for Forfeiture

In order to prevail in this action, the United States must demonstrate that the subject funds were substantially "connected with" drug activity. 21 U.S.C. § 881(a)(6) (stating that "[a]ll moneys ... or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter" are subject to forfeiture). The government need not, however, prove beyond a reasonable doubt that a substantial connection exists between the subject property and the illegal activity. Rather, "in forfeiture actions under 21 U.S.C. § 881(a)(6), the government merely must demonstrate the existence of 'probable cause for belief that a substantial connection exists between the property to be forfeited and the [illegal drug transaction].' " United States v. One 1987 Mercedes 560 SEL, 919 F.2d 327, 331 (5th Cir. 1990) (citing United States v. $4,255,625.39, 762 F.2d 895, 903 (11th Cir.1985), *cert. denied*, 474 U.S. 1056, 106 S.Ct. 795, 88 L.Ed.2d 772 (1986)). Upon taking the well pleaded allegations of the complaint as true,[1] the undersigned cannot say that the United States "cannot prove any set of facts that would entitle it to the relief it seeks." The court shall deny the motion of the claimant in this regard.

. Double Jeopardy

Alternatively, the claimant Carl Kirkland asseverates to this court that the government's attempt to forfeit the monies in question is violative of the constitutional prohibition against double jeopardy. This

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[1] Mr. Kirkland argues to the court that:

> The claimant was led to believe that his statements to law enforcement officials and subsequent plea would bar use of any such statements at any subsequent proceedings other than in the case in which the claimant pled to; and, had he known of the civil matters against him at that time a nolo-contendere plea would have been sought. The option of an Alford plea was never advised to the claimant at that time; and, had thus been known the statements in the furtherance of the plea negotiations could not be used against the claimant.

Claimant's Brief, p.4 (text as in original). Even if this court were to accept such a specious argument as barring the United States' use of the claimant's statements made under oath in open court, the undersigned still could not say that Mr. Kirkland is entitled to a dismissal in this case.

argument is also without merit, as this action is brought by the United States pursuant to § 881(a)(6). See, e.g., United States v. Ursery, --- U.S. ---, 135 L.Ed.2d. 549, 116 S.Ct. 2135 (1996) (noting that civil forfeitures under 21 U.S.C. § 881(a)(6) are not "punishment" for purposes of double jeopardy clause); United States v. Keyes, 87 F.3d 676, 681 n.8 (5th Cir 1996); United States v. One 1988 Provost Liberty Motor Home, 1996 WL 774089, *18 (S.D. Tex. 1996); see also United States v. One Assortment of 89 Firearms, 465 U.S. 354, 364, 104 S.Ct. 1099, 1105, 79 L.Ed.2d 361 (1984); One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 237, 93 S.Ct. 489, 493, 34 L.Ed.2d 438 (1972); United States v. Halper, 490 U.S. 435, 446-449, 109 S.Ct. 1892, 1900-1902, 104 L.Ed.2d 487 (1989). Therefore, this portion of the claimant's motion shall also be denied.

III. Conclusion

Upon careful consideration of the claimant's motion, the undersigned is of the opinion that it should be denied. By not presenting this court with any admissible evidence in support of his motion, Mr. Kirkland has failed to demonstrate the absence of genuine issues of material fact and therefore is not entitled to the entry of summary judgment in this cause. Further, the claimant has not proven to this court that he is entitled to the dismissal of this action pursuant to Fed. R. Civ. P. 12(b)(6). The motion of the defendant shall be denied.

A separate order in accordance with this opinion shall issue this day.

This the _____ day of April 2001.

_____
United States District Judge

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ORDER DENYING MOTION TO DISMISS
OR FOR SUMMARY JUDGMENT

Pursuant to a memorandum opinion issued this day, it is hereby ORDERED THAT:

) the motion of the claimant Carl Kirkland to dismiss this cause, or for the entry of summary judgment, is hereby DENIED.

SO ORDERED, this the _____ day of April 2001.

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United States District Judge